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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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TINA BEACH, Respondent

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY, Appellant

RESPONDENT'S REPLY BRIEF

RECEIVED
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Washington State
Supreme Court

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TABLE OF CONTENTS

1.	INTRODUCTION.....	1
2.	ARGUMENT.....	1
2.1	MS. BEACH'S PURCHASES USING HER EMPLOYER'S CREDIT CARD SHOULD NOT BE CHARACTERIZED AS MISCONDUCT UNDER RCW 50.04.294(1)(a).....	2
2.2	MS. BEACH'S PURCHASES USING HER EMPLOYER'S CREDIT CARD SHOULD NOT BE CHARACTERIZED AS MISCONDUCT UNDER RCW 50.04.294(2)(f).....	3
2.3	MS. BEACH'S PURCHASES USING HER EMPLOYER'S CREDIT CARD SHOULD NOT BE CHARACTERIZED AS MISCONDUCT UNDER RCW 50.04.294(1)(b).....	5
3.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<u>Ciskie v. State, Emp't Sec. Dep't</u> , 35 Wn. App. 72, 664 P.2d 1318 (1983)	6
<u>Michaelson v. Emp't Sec. Dep't</u> , 187 Wn. App. 293, 349 P.3d 896 (2015)	4
<u>Shaw v. Emp't Sec. Dep't</u> , 46 Wn. App. 610, 731 P.2d 1121 (1987)	4
<u>Smith v. Emp't Sec. Dep't</u> , 155 Wn. App. 24, 226 P.3d 263 (2010)	2
<u>Wilson v. Emp't Sec. Dep't. of State</u> , 87 Wn. App. 197, 940 P.2d 269 (1997)	4, 5

Statutes

RCW 50.32.160	7
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Other Authorities

Respondent's Opening Brief	5, 6
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Regulations

WAC 192-150-205	2
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1. INTRODUCTION

The Commissioner misinterpreted and misapplied the law in concluding that Ms. Beach was terminated for misconduct in accordance with RCW 50.20.066(1). The disputes surrounding Ms. Beach's purchases using her employer's credit card can be explained by the employer's lack of a clear reimbursement policy. Ms. Beach's job required extensive travel and discretion to incur business expenses while meeting with potential customers. At most, any actions Ms. Beach made regarding personal and business expenses and reimbursement were good faith errors in judgment and not misconduct.

2. ARGUMENT

**2.1 MS. BEACH'S PURCHASES USING HER
EMPLOYER'S CREDIT CARD SHOULD NOT BE
CHARACTERIZED AS MISCONDUCT UNDER RCW
50.04.294(1)(a)**

Ms. Beach's purchases using her employer's credit card do not constitute willful disregard of her employer's rights, title, and interests under RCW 50.04.294(1)(a). WAC 192-150-205 defines willful (as used in RCW 50.04.294 and RCW 50.20.066) to mean "intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker."

WAC 192-150-205(1). In providing this definition to the Court, the Department cites to language from Smith that corroborates the Department's rulemaking: "[I]t is sufficient [for misconduct purposes] that an employee intentionally perform an act in willful disregard for its probable consequences. Smith v. Emp't Sec. Dep't, 155 Wn. App. 24, 37, 226 P.3d 263 (2010)(citing Hamel v. Emp't Sec. Dep't, 93 Wn. App. 140, 146-47, 966 P2d 1282 (1998)). However, in focusing on whether Ms. Beach's actions were intentional, the Department ignores the additional clause of WAC 192-150-205(1) providing that where an intentional act occurs, claimants must be "aware that [they] are violating or disregarding the rights of [their] employer or a co-worker." The Department misconstrues the WAC by arguing - in short - that a claimant's intent to commit the act itself is enough to establish misconduct.

In addition to maintaining her previous arguments that her misuse of her employer's credit card was not intentional, Ms. Beach further asserts that she was not aware that she was violating or disregarding the rights of her employer. On February 13, 2015, just prior to her termination, Ms. Beach and Ms. Sander met and went through Ms. Beach's expense report line by line. AR 181. At no time during this meeting did Ms. Sander express to Ms. Beach that there were any issues with any of her expenses. *Id.* As part of her job duties with the employer,

Ms. Beach was required to travel frequently around the country to meet clients and attend conferences. AR 215. The associated costs were to be covered by her employer. *Id.* However, the employer did not have any written policies or procedures regarding the use of company funds. AR 73, 111. All agreements were made verbally. AR 74. Moreover, to further complicate the employer's credit card and reimbursement policies, Ms. Beach had been required to use her own personal credit card to front business expenses from July through October 2014. AR 173-174. Additionally, when she was hired, Ms. Beach was advised by another employee that if she put anything on her personal credit card, then she should claim it in an expense report and the employer would reimburse her. AR 208.

2.2 MS. BEACH'S PURCHASES USING HER
EMPLOYER'S CREDIT CARD SHOULD NOT BE
CHARACTERIZED AS MISCONDUCT UNDER RCW
50.04.294(2)(f)

Ms. Beach's purchases using her employer's credit card did not violate a reasonable company rule that she knew or should have known about under RCW 50.04.294(2)(f). The employer's credit card and reimbursement policies were unclear. The employer did not have any written policies regarding the use of company funds. AR 73. All agreements regarding business and personal expenses were made verbally.

AR 74. Nonetheless, even if Ms. Beach had violated a reasonable company rule that she was aware of, past case law supports the proposition that claimants' actions can be determined not misconduct where claimants have violated a reasonable company rule. *See e.g.*, Wilson v. Emp't Sec. Dep't. of State, 87 Wn. App. 197, 940 P.2d 269 (1997)(finding no misconduct where the claimant admitted to violating the employer's policy after losing two diamonds in two separate instances); Shaw v. Emp't Sec. Dep't., 46 Wn. App. 610, 731 P.2d 1121 (1987)(finding no misconduct when the claimant was late to work 14 times during 15 months and claimant's supervisors warned him 'all the time' about his tardiness); Michaelson v. Emp't Sec. Dep't., 187 Wn. App. 293, 349 P.3d 896 (2015)(finding no misconduct when the claimant was involved in three preventable accidents during a 12-month period and subject to discharge per his employer's progressive disciplinary policy).

In Wilson, the court characterized the claimant's actions as negligent or poor judgment when the claimant failed to log in a loose diamond and placed a plastic bag containing a diamond on his desk in the middle of empty plastic bags that were later put in the trash. Wilson, 87 Wn. App. at 204. The claimant had 17 years of experience in retail jewelry management and *admitted* that his actions *violated company policy* in his handling of the diamonds. *Id.* at 199. Nonetheless, the court reasoned that

the Wilson claimant's actions amounted to negligence, incompetence, or an exercise of poor judgment at most. *Id.* at 202. Nothing in the record established that "Wilson made a deliberate decision to act in defiance of the policy. Rather, it appears that Wilson fully intended to comply with the policy, but simply failed to do so in time to prevent the losses." *Id.* at 203. Unlike the Wilson claimant, the employer's policy relating to credit card purchases and reimbursements is unclear. However, even if the employer had a clear policy relating to this issue, the Wilson court's reasoning suggests that claimants' actions can still be found not misconduct in certain circumstances, even where the claimant admits that his conduct is in violation of company policy. It is Ms. Beach's position that this case is one such circumstance. Her actions amount to good faith errors in judgment as previously argued. *See* Respondent's Opening Brief 20-23.

2.3 MS. BEACH'S PURCHASES USING HER
EMPLOYER'S CREDIT CARD SHOULD NOT BE
CHARACTERIZED AS MISCONDUCT UNDER RCW
50.04.294(1)(b)

Ms. Beach's purchases using her employer's credit card were not deliberate violations or disregard of the standards of behavior which the employer has the right to expect of an employee under RCW 50.04.294(1)(b). As past case law explains, "[n]ot every deviation from the reasonable demands of an employer bars unemployment benefits."

Ciskie v. State, Emp't Sec. Dep't, 35 Wn. App .72, 76, 664 P.2d 1318 (1983)(finding no misconduct when claimant deviated from the proper notification procedure to leave the worksite after receiving notification of a family emergency). For example, the Ciskie employer certainly had a right to expect that its employees would notify an appropriate supervisor prior to leaving the worksite. *Id.* at 74. Nonetheless, the Ciskie court reasoned that “[g]ood cause for discharge is not to be equated with misconduct disentitling the worker to benefits.” *Id.* at 76 (citing 76 Am.Jur 2d *Unemployment Compensation* § 53. A deviation from the employer’s standard of behavior can evidence poor judgment or negligence. *Id.* at 76. Ms. Beach’s deviations from her employer’s expectations were good faith errors in judgment as previously argued. *See* Respondent’s Opening Brief 20-23.

3. CONCLUSION

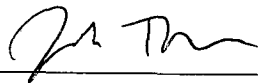
For all the above reasons, and for the reasons stated in Respondent’s opening brief, Ms. Beach respectfully requests that this Court modify the Commissioner’s Decision and find that Ms. Beach made authorized charges on her employer’s credit card, and that she adequately accounted for her personal expenses to the best of her knowledge. Furthermore, Ms. Beach requests that this Court reverse the Commissioner’s Decision and conclude that Ms. Beach was not

discharged for misconduct pursuant to RCW 50.20.066(1), allowing Ms. Beach to collect unemployment benefits.

Ms. Beach further requests that reasonable attorney fees be awarded in the amount to be determined upon filing of a cost bill subsequent to this order. RCW 50.32.160 (mandating that attorney fees and costs shall be awarded upon reversal or modification of a Commissioner's order.)

Dated this ____ day of April 2017.

Respectfully submitted,



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TINA BEACH,)	
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Respondent,)	
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v.)	
)	No. 49688-7-II
STATE OF WASHINGTON,)	
DEPARTMENT OF EMPLOYMENT)	
SECURITY,)	
)	
Appellant.)	
_____)	

CERTIFICATE OF SERVICE BY MAIL

I certify that I emailed an electronic copy and mailed a paper copy of the Respondent's Reply Brief in this matter postage prepaid, on April 28, 2017, to the Appellant ESD's attorney, Kara Tebeau, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this 28th day of April 2017, in Seattle, WA.



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